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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSAL C.I.T. CREDIT COR-
PORATION,

Plaintiff,

—vs.—

REX L. SOHM and KATHERYN
SOHM,

Defendants and Respondents,

—vs.—

RICHARD H. NICKLES, dba ZION
MANAGEMENT,

*Third-Party Defendant
and Appellant*

FILED

MAY 29 1963

Supreme Court, Utah

Case No. 9865

BRIEF OF APPELLANT

Appeal From the Judgment of the Third Judicial
District Court for Salt Lake County,
HONORABLE JOSEPH G. JEPPSON, *Judge*

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UNIVERSITY OF UTAH

OCT 29 1963

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Case No. 9865

BRIEF OF APPELLANT

NATURE OF THE CASE

This action was initiated by Universal C.I.T. Credit Corporation to recover the unpaid balance on a promissory note executed by Rex L. Sohm and Katheryn Sohm. The note had been assigned to the corporation by Richard H. Nickles, dba Zion Management, and had been given to Nickles as consideration for a "Westinghouse Speed-O-Light Electronic Range" which had been purchased

from him by the Sohms. After the initial complaint was filed, the Sohms brought a Third-Party Complaint against Nickles alleging that Nickles had induced them to purchase the electronic range by making false and fraudulent statements concerning its capabilities.

DISPOSITION BEFORE LOWER COURT

Universal C.I.T. Credit Corporation and the Sohms settled the issues presented in the original complaint prior to trial. The case was then tried to the court, sitting without a jury, on the Third-Party Complaint. The issues were whether or not Nickles had made fraudulent misrepresentations to the Sohms which had induced them to purchase an electronic range to their damage. The trial court found these issues in favor of the Sohms and against Nickles, and entered judgment accordingly.

Richard H. Nickles, dba Zion Management. will hereinafter be designated as *appellant*, and Rex L. Sohm and Katheryn Sohm will hereinafter be designated as *respondents*.

RELIEF SOUGHT ON APPEAL

The appellant seeks to vacate the findings that fraudulent representations concerning the capabilities of the electronic range were made to respondents, who, in reliance thereon, purchased such a range to their damage; to have the judgment entered on such findings set aside; and to have this case remanded to the District Court of Salt Lake County with instructions to enter

judgment in favor of the appellant and against the respondents, no cause of action.

STATEMENT OF FACTS

In the year 1960, appellant operated a business in Salt Lake City, Utah, under the name of Zion Management. He sold a product called the "*Westinghouse Speed-O-Light Electronic Range*." (R-11, 135)

Westinghouse company furnished the appellant with literature and sales material which described the operation and capabilities of their range. The following are some of the statements taken from this literature:

"In the Westinghouse Electronic Range *** you do not cook with heat—you cook with microwaves, a particular type of high frequency radio energy. The oven remains cool. The utensils remain cool. Only the food becomes hot." (Exh. no. 13)

"While electronic cooking is amazingly fast, and the reactions which produce heat in the food when microwave energy is absorbed are quite complex, no physical change takes place in the food other than those normally produced in cooking. The nutritive value of the food is not altered—on the contrary, the nature of microwave cooking and its speed tend to retain more of that value than conventional methods." (Exh. no. 13)

"The Electronic Range cooks with microwaves. . . high frequency radio energy that is converted into heat only when it is absorbed . . . and in the Electronic Range only *foods* absorb energy. The metal walls of the oven *reflect* it . . . glass, china and paper cooking utensils (metal is never used) *transmit* it. Thus, the only heat

generated is in the food—not in the utensils or the oven. The microwaves penetrate the food from all angles, foods and liquids become hot inside and outside at the same time, cook much faster than by conventional methods of heating.” (Exh. no. 1)

“You can cook in the dishes you’ll use at the table! you can take piping hot food from a cool oven.” (Exh. no. 1)

“Use glass dishes or paper plates. Individual servings can be cooked on plastic or china plates and served.” (Exh. no 10)

“Now the miracle of Electronics comes to food preparation. With the Westinghouse Electronic Range, foods that normally require minutes are cooked in seconds . . . those requiring hours are done in minutes. No heat control to set . . . a Timer does it all.” (Exh. no. 1)

“The electronic range will save time in the kitchen—fresh foods cook so quickly and leftovers no longer taste like they had been cooked yesterday. Caseroles can be prepared in the morning and reheated in minutes at serving time. Too, this is perfect for quick defrosting of foods from the freezer. A precooked frozen meal will go from the frozen state to the dinner plate in 4 minutes.” (Exh. no. 10)

“It takes a little pre-meal planning to get the best out of your Electronic Range—planning that will become second nature to you in a very short time.

“Do the foods that are to be served cold—example, brownies—first so they’ll have time to cool. Then prepare all the other foods. Cook the roast first and let it stand. During the usual 20-minutes standing time—during which the roast gets hotter instead of cooler! — cook the other foods, one at

a time. If any of them cools below serving temperature, just return to the range for a few seconds.

“You’ll find that you don’t have to start cooking dinner in the middle of the afternoon. You can do it all—and serve it piping hot—if you start only about 30 minutes before dinner time.” (Exh. no. 13)

Westinghouse furnished each of its electronic ranges with a set of 225 cards containing cooking instructions, suggested menus *with the sequence in which foods should be prepared*, and over 400 recipes for cooking different types of food. These included recipes for appetizers, beverages, breads, cakes, candy, confections, cereals, cheese, cookies, desserts, eggs, jams, jellies, meats, poultry, pies, sandwiches, sauces, dressings, soups and vegetables. Westinghouse also gave appellant an additional set of 308 cards containing still more recipes. On the first card of the set which is standard equipment with the range appears the statement: “*All recipes given in this file are to be cooked in the electronic range.*” (Exh. nos. 1, 10, 15; R-132, 133)

The appellant was generally acquainted with Westinghouse and Westinghouse products. He knew that the company had been in business for many years. He had used Westinghouse products, and he accepted Westinghouse statements as to the capabilities of the Westinghouse electronic range in good faith. He believed, and still believes, that the range will perform as represented by Westinghouse, provided the person using it is willing to learn new cooking techniques. (R-148, 149, 150)

The appellant employed Patricia Strong, who had formerly worked as a food demonstrator for Continental Baking, to demonstrate the Westinghouse electronic range to prospective customers. She was not authorized to make any statements to customers which were not contained in the Westinghouse literature. (R-131, 138)

Patricia Strong made a demonstration and an oral presentation to prospective purchasers of the electronic range. She fried bacon, cooked pieces of hot dog, and boiled water. All the information in her oral presentation was taken from literature received from Westinghouse. (R-131, 132, 133, 134)

Patricia Strong also did personal cooking with the range. She cooked meat loaf, baked potatoes, boiled potatoes, roasted ham, cake, pancakes, fried eggs, casseroles, and cooked whole meals in a matter of minutes. She never represented to any person that the electronic range would do anything that she either had not tried herself or had not read in Westinghouse literature, and she believed the statements she made to be true. (R-134, 135, 159, 162, 165, 169)

On the 28th of June, 1960, respondents went to Zion Management to hear about the electronic range, having been originally told about it by another couple. They received a demonstration and listened to a discussion of its capabilities. (R. 52, 53)

According to respondents, Patricia Strong showed them the file of recipes underneath the range (R-55), and made the following statements concerning it:

It cooked quickly and efficiently. (R. 55)

Dishes could be used right off the table, put in the range and then put back on the table to eat from. (R-55)

The range cooked wholewheat bread, rolls and cookies efficiently, but a recipe for wholewheat bread would have to be obtained from the company. (R-55, 56)

The range would cover all of the cooking needs of respondents' family, and they would not need any other unit. (R-56)

The electronic range would not cook hot cakes and respondents would need a griddle. (R-56)

The electronic range could be used for cooking whole grain wholewheat mush. (R-57)

The range would cook anything that respondents used to cook for the family. (R-57)

She (the demonstrator) didn't "know exactly in regard to putting up fruit" but would get that information. (R-58)

The range would cook a roast, surrounded with potatoes and carrots, in a matter of moments. (R-60)

You could cook a full meal in a matter of minutes. (R-107, 108)

Thereafter, respondents purchased a Westinghouse electronic range from appellant for the sum of \$1195.00, and the negotiable paper executed by them was assigned to Universal C.I.T. Credit Corporation. The range was installed (incorrectly, however) in respondents' home on or about July 3, 1960. (Exh.s 2, 3; R-66, 67, 79)

Respondents left on a vacation at the time the range was installed and were gone for about a week. After

their return (July 10, 1960) they began to use the range for cooking. (R-82) They experienced the following difficulties:

An attempt to fry eggs resulted in baking them, they were dry and cooked so fast they were hard and didn't taste good. None of the family liked them. (R-68, 69)

Fried pork chops and hamburger were more or less baked, also. (R-69)

Meat that had a lot of moisture was fairly good, but drier meats were unpalatable. (R-69)

Certain cuts of meat had to be purchased because regular cuts did not cook thoroughly and it took so long to cook them. (R-70)

"The time element was such that it cooked so rapidly, oh, if it cooked a second or so over, even sometimes it was really dry and overcooked, and then unpalatable." (R-70)

A lot of food was wasted trying to cook with the range. (R-70)

Cookies were not good. They were very dry and cooked so rapidly. (R-70)

Bread just did not raise. It cooked too rapidly. It did not give the bread a chance to bake like it should, and it was dry and hard. (R-70, 71)

Mush, when cooked in proportions needed for a family, kept boiling over. (R-71)

Melmac burned around the edges and could not be used (R-72)

The larger the amount of the potatoes, the harder they were to boil. (R-73)

Baked potatoes were fine. (R-73)

There was difficulty cooking certain types of food together. (R-73)

It was necessary to cook macaroni and spaghetti quite a while, and there was still difficulty in cooking them. (R-74)

Rolls could not be baked. (R-75)

The larger the quantity of food, the more difficult it was to use the range. (R-75)

"It was just a big headache, opening and shutting that door and trying to take things out and in, and by the time I got some foods done and put them aside to get something else done, then what I had put aside was cold. Those cards indicated a certain amount of food. It is a new thing, and so the time element had to have careful consideration. In the case of the electronic range, the time it is done, to a fraction of a second, if you leave it over that amount it spoils the food, so you have to watch this very carefully, and stand right there. If something is done and you put it back to warm it, in a second or two you can't eat it." (R-113)

"I kept ruining food, and the limitations on those recipes, and any cooking—if you are working with a time element in a split second, and ruining those foods, if you have a proportion of food that is not indicated on those file, then you have to do guess work. You can't guess with that electronic range because it ruins them in a matter of seconds, and that is why it is not useful for a family." (R-114)

"A: I was dealing with something very entirely different than I was used to, so I was following the recipes, I was following Mr. Nickles, and the demonstrator's instructions to me. I was not trying to cook my food as I did before. I was told that this was entirely revolutionary, a very different way of cooking, and I was learning how

to use that, and I was using the recipes in that file.

Q: But the recipes in the file did not have all of the precise quantities that you would use with your family?

A: No, and that is why I made calls saying that it was difficult to use it.

Q. What you had to do was ascertain the length of time you had to leave those foods in the oven to meet the requirements of your family?

A: Yes, and in doing so it is a terrifically big job, with a family, and with the amount of food that is on the market, to cook and to prepare for a family, and in that case, you did not save time at all. It was just a great big headache.

Q: That time sequence, having to learn how to adjust the oven for particular foods, was so burdensome you decided the oven was not usable for your purposes?

A. Yes. It was not." (R-114, 115)

The respondents first complained to appellant that the range was not satisfactory about a month after they started using it, and they complained several times thereafter. (R-82, 83, 84)

Within a month after the range had been installed in respondents' home, respondents persuaded a relative to purchase one also. For doing this they were paid a referral fee by appellant. (R-115)

On October 24, 1960, approximately 4 months after purchasing the range, respondents wrote to Universal C.I.T Credit Corporation requesting that their monthly payments be changed. They also wrote Westinghouse

several times about their range. Westinghouse checked the range on July 10, 1961, approximately one year after it was purchased by respondents and it operated perfectly at that time. (R-75, 76, 86, 122; Exh. 9)

Thereafter, respondents stopped making payments to Universal C.I.T. Corporation, and as a result this action was initiated on January 23, 1962.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT MADE FALSE STATEMENTS TO THE RESPONDENTS CONCERNING THE CAPABILITIES OF THE WESTINGHOUSE ELECTRONIC RANGE.

Finding of Fact No. 2 entered by the Trial Court states as follows:

“2. Said Third Party Defendant and his agents in order to sell said Electronic Range to Third Party Plaintiffs made the following representations of an existing fact:

- (A) That the Electronic Range would do anything a regular oven and surface unit would do and that no other unit would be necessary except for a griddle for the cooking of hot cakes.
- (B) That the Electronic Range would fry eggs, bake bread, cook breakfast cereal, and can fruit.
- (C) That cooking could be done in regular tableware including Melmac.” (R-40, 41)

Finding of Fact No. 3 is to the effect that said statements were false and fraudulantly made. (R-41)

We respectfully submit that the Trial Court misinterpreted the evidence. As stated by this Court in the case of *Pace et al. v. Parish*, 122 Utah 141:

“The burden was upon the plaintiffs to prove the fraud charged by clear and convincing evidence. *Taylor v. Moore*, 87 Utah 493, 51 P.2d 222; *Campbell v. Zion's Co-op. Home Building & Real Estate Co.*, 46 Utah 1, 148 P. 401; *Ferrell v. Wiswell*, 45 Utah 202, 143 P. 582.”

Finding (A) (that the electronic range would do anything a regular oven and surface unit would do and that no other units would be necessary except for a griddle for the cooking of hotcakes) together with the Finding that such a representation forms a basis for a finding of fraud, seems clearly contradictory. Obviously, the range would not do everything a regular oven and surface unit would do if a griddle was necessary for cooking hot cakes. This finding follows the testimony of the respondents to the effect that they were told by an agent of appellant that the electronic range would not cook hot cakes and that a griddle would be needed. (R-56)

Could the respondents, having received such information, reasonably assume that the range would cook all known types of food excepting only the *specific item of hot cakes*?

We think that the disclosure that a griddle would be necessary to cook hot cakes put the respondents on rea-

sonable notice that the electronic range did have some limitations and that Finding (A) cannot be used as a basis for fraud.

Finding (B) (that the electronic range would fry eggs, bake bread, cook cereal, and can fruit) was not proved to be a false statement.

The record does not substantiate that respondents were told that the range could be used to can fruit. In this respect, respondents testified that appellant's agent stated: "I don't know exactly in regard to putting up fruit, but I will get the information for you. I am sure that if it performs all of the cooking needs that it will do that also." (R-58)

Furthermore, there is nothing in the record to indicate that the range cannot be used to can fruit.

Also, respondents did not present any evidence that the range would not fry eggs, bake bread, or cook breakfast cereal. The testimony offered by the respondents was to the effect that when respondents tried to cook these things the result was not satisfactory. It is submitted that much of today's cooking, whether in an electronic oven, or otherwise, is unpalatable and an abomination. The fault lies not with the cooking equipment but with the cook.

Appellant's agent testified that she fried eggs in the electronic range. (R-162) A recipe certainly is not needed for frying eggs, but the recipe file furnished respondents with their range contains 13 recipes for cooking eggs in various different styles. (Exh. 10)

The first card in the recipe file under the subject of "BREADS" contains this statement: "*Do not overbake bread because it becomes hard and dry. Breads should be cooked on shelf; if it is browned, cook and brown on top shelf position. Use high speed.*" The file contains 18 recipes for cooking different types of bread products. (Exh. 10)

The recipe file also contains 15 recipes for cooking breakfast cereals. (Exh. 10)

Finding (C) (that cooking could be done in regular tableware including Melmac) was not proved to be false.

Westinghouse advertised that: "*You can cook in the dishes you'll use at the table!*" (Exh. 1) "*Use glass dishes or paper plates. Individual servings can be cooked on plastic or china plates and served.*" (Exh. 10) "** * * in the Electronic Range only food absorbs energy, glass, china and paper cooking utensils (metal is never used) transmit it.*" (Exh. 1)

The only evidence offered by respondents was that one piece of Melmac burned around the edges when used in the range. (R-72; Exh. 6) All the other testimony was to the effect that the only types of containers that could not be used in the range were those made of metal. Respondents did not complain of any other instance where china, glass, plastic or paper containers could not be used as advertised by Westinghouse.

As stated by this Court in the case of *Lewis v. White*, 2 Utah 2d 101, at page 103:

"It is of course true that it must be assumed that a seller will represent his property at least

in its best light. A certain amount of 'puffing' must be taken into account and allowed for so long as it does not amount to active deception or concealment."

Respondents admitted that their problem was that they had trouble in learning how to cook on the electronic range. This was what led them to complain about it — not the fact that any misrepresentation was made to them. They testified: "*I kept ruining food, and the limitations on those recipes, and any cooking — if you are working with a time element in a split second, and ruining those foods, if you have a proportion of food that is not indicated on those files, then you have to do guess work. You can't guess with that electronic range because it ruins them in a matter of seconds, and that is why it is not useful for a family.*" (R-114, 115) In answer to the question: "But the recipes in the file did not have all of the precise quantities that you would use with your family," respondents replied: "No, and that is why I made calls saying that it was difficult to use it.

POINT II.

THE TRIAL COURT ERRED IN FINDING THAT APPELLANT HAD KNOWLEDGE OF THE FALSITY OR SHOULD HAVE KNOWN OF THE FALSITY OF THE STATEMENTS MADE CONCERNING THE CAPABILITIES OF THE WESTINGHOUSE ELECTRONIC RANGE.

Finding of Fact No. 3 entered by the Trial Court states (in part):

"that the Defendant had knowledge of the falsity or should have known of the falsity of said

statements, but still recklessly made said statements with the intent to induce said plaintiffs to purchase the Electronic Range." (R-41)

The appellant vigorously denies, as set forth in Point I, that any false statements were made concerning the Westinghouse Electronic Range. However, for purposes of argument, had any of said statements in fact been false, there is absolutely no evidence in the record that appellant either knew or should have known that such was the fact.

The elements of fraud have been stated by this Court in the case of *Pace et al. v. Parish*, supra, as follows:

"This being an action in deceit based on fraudulent misrepresentations, the burden was upon plaintiffs to prove all of the essential elements thereof. These are: (1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) *which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation*; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage." (Emphasis added)

In an attempt to show that appellant had received complaints similar to those made by respondents PRIOR to the date (June 28, 1960) on which respondents purchased their range, respondents offered the testimony of Laverda Peterson. Laverda Peterson testified that

she had purchased an electronic range from appellant on January 11, 1960, and that she had been involved in a law suit because she had failed to pay for it. (R-89, 96)

After Laverda Peterson had testified, counsel for appellant discovered that she had not purchased her range until the 11th day of June, 1961, ALMOST A YEAR AFTER RESPONDENTS PURCHASED THEIR RANGE. Counsel for appellant disclosed this fact to the court and requested that Laverda Peterson be recalled for further examination. This the Trial Court refused to do (which we submit was error) but the Trial Court did strike the testimony of Laverda Peterson from the record. (R-99, 100)

All of the evidence properly in the record is to the effect that appellant was fully justified in believing the representations made concerning the Westinghouse Electronic Range to be true.

The representations that Westinghouse made concerning its Electronic Range are contained in the literature which Westinghouse gave to appellant. (Exh.s 1, 10, 11, 12, 13, 14, 15) Some of their statements are set forth above in the Statement of Facts on pages 3 and 4 of this brief. Westinghouse affirmatively represented that the range cooked "amazingly fast", that "you can use dishes you'll use at the table!", that "foods that normally require hours are done in minutes," etc. (Exh. 1, 10, 13) Also, the range was equipped with a set of 225 cards containing over 400 recipes for appetizers, beverages, breads, cakes, candy, confections, cereals, cheese,

cookies, desserts, eggs, jams, jellies, meats, poultry, pies, sandwiches, sauces, dressings, soups, and vegetables. (Exh. 10, 15)

As stated above, the appellant was generally acquainted with Westinghouse and Westinghouse products. He knew that the company had been in business for many years. He had used Westinghouse products, and he accepted Westinghouse statements as to the capabilities of the Westinghouse electronic range in good faith. He believed, and still believes, that the range will perform as represented by Westinghouse, provided the person using it is willing to learn new cooking techniques. (R-148, 149, 150)

The appellant employed a person who was a professional food demonstrator. She had previously worked as such for Continental Baking. (R-131, 138) This person did personal cooking with the range and the results fully indicated that it would perform as claimed. (R-134, 135, 159, 162, 165, 169)

It is submitted that there is no evidence in the record upon which to base a finding that appellant knew or had reason to know that any representations made concerning the capabilities of the Westinghouse Electronic Range were false.

CONCLUSION

The evidence in this case is to the effect that respondents were unable to cook properly on the Westinghouse Electronic Range — not that any misrepresentations

were made to them as to the capabilities of the range. The evidence is also to the effect that the range will perform exactly as represented, if used properly.

Furthermore, the only evidence in the record concerning appellant's knowledge of the capabilities of the range discloses that he was fully justified in making the representations that were made.

We respectfully submit that this case should be remanded to the District Court of Salt Lake County with instructions to enter judgment in favor of the appellant and against the respondents, no cause of action.

Respectfully submitted,

Barker & Ryberg

Attorneys for Appellant